

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-2058

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES HENRY ROLLINS,
APPELLANT,

-v-

UNITED STATES OF AMERICA,
APPELLEE.

DOCKET NO. 77-2058

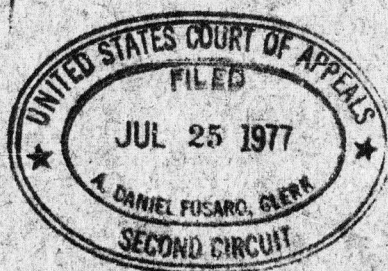
BRIEF FOR APPELLANT

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Appendix

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT

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-----X
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-v-

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DOCKET NO.

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGEMENT
OF THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANT'S PETITION FOR
A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2255 by (1) CONSTRU-
ING THE PETITION AS A MOTION FOR A NEW TRIAL AND (2) THEN APPLYING
THE CRITERIA OF THIS CIRCUIT RELATING TO MOTIONS MADE PURSUANT TO
RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

STATEMENT PURSUANT TO RULE 28(a) (3)

PRELIMINARY STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of New York (The Honorable John M. Cannella) rendered on April 12, 1977, denying appellant's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255.

STATEMENT OF FACTS

A. Background of Case

Appellant was indicted on October 10, 1974, by a federal grand jury and charged with two counts of mail fraud (Count One and Two, 18 U.S.C. §1341), use of a fictitious name to commit a fraud involving the use of the mails (Count Three 18 U.S.C. §1342) and entering a bank to commit a larceny (Count Four, 18 U.S.C. 2113(a)).

The Government's theory at trial was that a former employee of the Kenyetta Avenue branch of the Standard Bank, Ltd., in Nairobi, Kenya, had mailed from Nairobi two forged "mail transfer" money orders of approximately \$650,000 to the Avenue B branch of Manufacturers Hanover Trust Company in New York City. The Money orders directed Manufacturer Hanover Trust to credit this sum to the account of KODI'S Domestic and International Enterprises, an account opened and maintained by appellant. Appellant, who was arrested at the bank on the day the funds were to have become available, claimed that the sum was for a large shipment of wheat which he was to, upon receipt of the funds, arrange to be sent to Nairobi, Kenya, and that he was an innocent victim of the scheme.

B. THE MOTION TO SUPPRESS

Prior to trial appellant moved to suppress two passports which the Government sought to introduce into evidence for the purpose of showing that appellant had traveled to Kenya in 1971. These passports had been seized from appellant's apartment in Oakland, California, in 1971 during the execution of a police search based on an alleged search warrant issued by a California judge. (TR 5-7) Appellant demanded that the search warrant and supporting affidavit be produced at the hearing. The Government complied by turning over unsigned and unsworn copies of the documents demanded. The Government did not give Rollins a copy of the statement that Ronald Williams, the informant, had given to the police. Appellant's motion to suppress based on the absence of probable cause was summarily denied. (TR 7) The Appellant went to trial on the charges.

C. The Government's Case at Trial

The Government's case against appellant was circumstantial. In an effort to show that appellant was a knowing participant in the scheme, the Government called twelve witnesses and introduced into evidence the passports taken from his apartment during the 1971 search by Oakland, California police officers.

Sargent Fred Farkas, a police officer from Oakland, California, testified that he had participated in the search of appellant's apartment at 9917 99th Avenue Court on September 24, 1971, and had seized two passports. (TR 195) Both passports were received into evidence (Government's Exhibits #5-A and 6-A). The Assistant United States Attorney immediately directed the jury's attention specifically to Government Exhibit 6-A, which contains travel stamps indicating a visit to Kenya during July and August 1971 under a passport

bearing appellant's photograph but the name of "Lynwood Evans." In summation, the Government argued that this exhibit was proof of the opportunity to make contacts later used to commit the fraud charged in this case. (TR 313)

The introduction of the passports raised the issue of appellant's dual identity, which led the Government to call three witnesses to prove that appellant had used a fictitious name, "Lynwood Evans" in the past, that the name, "Robert R. Cody", he was using when he opened the bank account was also fictitious and that his real name was "James Henry Rollins". Edward Hunvold, a professor of law and the dean of admissions at the University of Missouri Law School, identified appellant as a former law student who, under the name of James Henry Rollins, attended law school between 1965 and 1967 (TR 171-172). Sigred Lewis testified that she knew appellant when he lived in Oakland, California, in 1971, where he used the name "Lee Evans." (TR 181-182)

The Government also introduced the application for the passport issued under the name "Rollins" (Government's exhibit #5-B), and two applications for a passport in the name "Evans". (Government's exhibits #6-B and #6-c) Thomas Donovan, a handwriting analyst with the Postal Service, testified that a comparison of the handwriting on those three applications with known specimens of appellant's handwriting revealed that, in Donovan's opinion, the same person wrote all of them. (TR 221)

Appellant was convicted on Counts One and Two of mail fraud. Count Three was dismissed with the consent of the Government following a mistrial caused by the jury's inability to reach a verdict on that charge. Count Four was dismissed at trial for insufficiency of

the evidence. (TR 267)

Appellant was sentenced on December 11, 1974, to concurrent terms of three and one-half years on each of the two counts. This Court assigned The Legal Aid Society, Federal Defender Service unit, as counsel on appeal pursuant to the Criminal Justice Act. Docket number 74-2610 was assigned to the case on appeal. This Court affirmed the conviction on September 15, 1975.

D. Newly Discovered Facts of Illegal Search And Seizure of Passports

After sentencing, Appellant, on April 2, 1975, was transferred to Oakland, California, under the interstate agreement on detainers, to be tried on the charges pending there. Appellant filed a motion for discovery in the Circuit Court of Alameda County and it was granted. The District Attorney, under California law, turned over all of the information that he had in his files, reluctantly. Among the material was a statement that Ronald Williams had given to Police Officer B. Flaherty, #6628P on September 23, 1974, at 4:10 PM. The statement had not been given to Conrad Blevins as he stated in the affidavit. Petitioner, after reading the statement and comparing it with the affidavit, discovered that there were misrepresentations of material facts in the affidavit by commission and omission, that went to probable cause and to the credibility of the informant.

A comparison of the affidavit of Conrad Blevins and the statement of Ronald Williams, clearly shows, that Conrad Blevins intentionally misrepresented what Williams allegedly told him. As was stated above, it is not clear whether Blevins ever talked to the informant. This is one crucial misrepresentation. Blevins' affidavit states that Ronald Williams saw Lee J. Evans "run from the office." This was not true. Ronald Williams stated that when he first saw Lee J. Evans, he

was in the driveway next to 1263-99th avenue which is approximately a half block away from the office where the shooting took place. Ronald Williams was setting on the porch at 1307-99th avenue and could not possibly see the office from where he was setting. The office was located behind building 10, which obstructed Williams line of vision. It was unreasonable for Blevins to even believe that Williams could have seen the office building because of this. (see exhibit C, statement of Ronald Williams and Exhibit A, diagram of area)

The affiant, Conrad Blevins, had information that he omitted to include in his affidavit. These omissions went to the credibility of the informant and were material. Intentional misrepresentation by omission of material facts are as important as misrepresentations by commission according to the law. Informant Ronald Williams stated to the police that one of the victims was his brother. Russel Richardson who was the manager of the Garden manor Square Apartments, also gave a statement to the police accusing Sam Griffen of the killings. It should be pointed out that Conrad Blevins was the sargent in charge of the investigation and had access to all of the information collected.

During the course of the trial, testimony was given that there were rival factions in the Garden Manor Square Apartments and that Lee J. Evans was a rival of Ronald Williams. This information was given to Conrad Blevins. This information shows that the informant was not a disinterested citizen.

Sam Griffen, after being arrested by the police at the scene of the crime with a gun, told Blevins in a taped conversation that some

gamblers had a contract out on both of the deceased. Blevins intentionally omitted these material facts from his affidavit because it would have affected the magistrates' determination as to probable cause, as it went to the credibility of the informant. Blevins had knowledge of all of these facts and he admitted it in proceedings under Oath.

Conrad Blevins testified under Oath, at proceedings in California, on several occasions. It was learned from his testimony that police went to the apartment at 9917-99th avenue court looking for Lee Evans on September 23, 1971. Richard Graham and Annette Hughes testified that these police officers had broken open the door to the apartment and searched for Evans and a 9mm pistol. Neither was found in the apartment. It was during this illegal search that the police discovered the passports and seized them.

Blevins was involved in or had knowledge of the illegal search on September 23, 1971. The Passports were illegally seized and used as the basis for the description of Lee J. Evans in an APB issued at 8:30 PM, on September 23, 1971. This information does not appear in any of the statements or information given to the police. The September 23 search and seizure of the passports was without a warrant.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2255 BY (1) CONSTRUING THE PETITION AS A MOTION FOR A NEW TRIAL AND (2) THEN APPLYING THE CRITERIA OF THIS CIRCUIT RELATING TO MOTIONS MADE PURSUANT TO RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Appellant, in filing his original petition for a writ of habeas corpus pursuant to 28 U.S.C. §2255, inadvertantly used the term "Based on newly discovered evidence...." in setting out the grounds for his claim. More accurately Appellant's claim is based on newly discovered facts relating to the search and seizure of the two passports that were introduced as evidence at his trial. The Court below seized upon this statement and construed the 2255 motion to vacate sentence as a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The Court then applied the criteria of this circuit in relations to a motion made pursuant to this rule. The fact that Appellant used the term "newly discovered evidence" did not make the petition a rule 33 motion. Writs of habeas corpus should be liberally construed.

The Court states in it's memorandum opinion that the appellant does not meet the third criteria of this court concerning newly discovered evidence. The Court cites three cases in support of it's conclusion. A serious reading of each of the three cases, Slutsky, Schwartzbaum, and Stofsky, will reveal that these cases are setting a standard for a motion for a new trial under Rule 33. These cases are not authority for writs of habeas corpus.

The standard that the Court should have used for reviewing constitutional claims--including a claim of illegal search and

seizure-- as presented by appellant, is set out at length in Townsend v Sain, 372 U.S. 293, 313, 83 S. Ct 745, 9 L.Ed2d 770 (1963). In the Townsend decision the Supreme Court of the United States held that an evidentiary hearing is required:

"1) the merits of the factual dispute were not resolved in the state hearing; (2) the states factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." Id at 313

The Townsend decision is authority for state prisoners, but federal prisoners are no less entitled to consideration than are state prisoners, and there is no reason to treat federal trial errors as less destructive of constitutional guarantees than state trial errors, nor to give greater preclusive effect to procedural defaults by federal prisoners than to similiar defaults by state prisoners.

The Supreme Court has held that all of the standards except (3) applies to federal prisoners. It said:

"We perceive no difference between the situation of State and Federal prisoners which should make allegations of the other circumstances in Townsend v Sain less subject to scrutiny by a 2255 Court." Kaufman v United States, 394 U.S. 217, 227, 89 S. Ct. 1068.

The District Court concluded that "because the Court fails to find that the absence of the evidence probably would have produced a different verdict, the instant application is denied." It is not proper for the Court to decide in a motion to vacate sentence, whether the illegally seized evidence would have produced a different results. The proper function of the Court in a motion to vacate sentence is as stated in the statute 28 U.S.C. §2255:

"Unless the motion and the files and records of the case conclusively shows that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of facts and conclusions of law with respect thereto. If the court finds that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to colateral attack, the Court shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

An illegal search and seizure causes the exclusionary rule to operate. The application of the exclusionary rule is not made to turn on the existance of a possibility of innocence; rather the exclusion of illegally seized evidence is deemed necessary to protect the rights of all citizens, not merely the citizen on trial, to be secured against unreasonable search and seizure. See Kaufman v United States supra at 228.

The Supreme Court in Miller v United States, 357 U.S. 301, 313, 78 S. Ct. 1190, 2 L. Ed2d 1332, (1958):

"We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirement is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.... Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house."

Thus, if Appellant can prove at a hearing that the evidence was illegally seized, then it should have been excluded as evidence in the trial. It is not necessary to prove or show that the verdict would be different even though the relief sort would be a new trial.

Appellant has made the initial showing that the affidavit contains a falsehood which is a prerequisite to a hearing on the varacity of the affidavit. See United States v Steinberg, 525 F2d 1126, 1130-31(2nd Cir 1975); United States v Dunning, 425 F2d 836, 840 (2nd Cir. 1969)

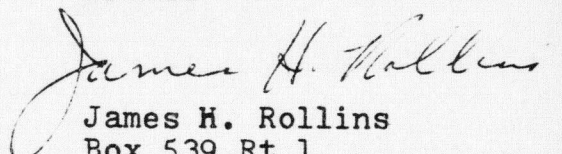
Appellant has further shown that the misrepresentation was material and intentional therefore, the sentence should be vacated. United States v Gonzales, 488 F2d 833 (2d Cir. 1973); See also United States v Bozza, 365 F2d 206, 223-224 (2d Cir. 1966)

In United States v Suarez, 380 F2d 713, 716 (2d Cir. 1967), This Court said by way of dicta that "it may be that testimony at trial could so clearly demolish statements in an affidavit supporting a warrant, that a prior denial of a motion to suppress would be overruled." This testimony has been brought to the attention of the district court in a writ of habeas corpus. The same principal would apply in this case.

CONCLUSION

For the above stated reasons the judgment of the District Court should be reversed and the case remanded to the District Court for a hearing or in the alternative the sentence of the Appellant should be vacated and a new trial granted.

Respectfully submitted
Pro-se

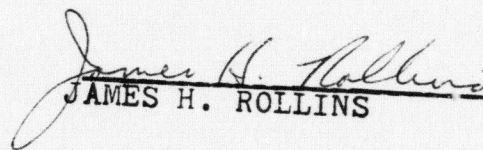

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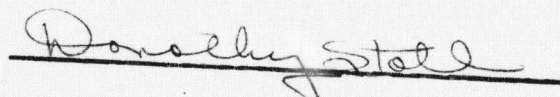
CERTIFICATE OF SERVICE

I, JAMES H. ROLLINS, being duly deposed and says that I have mailed a copy of this brief to the United States Attorney via United States Mail Postage prepaid addressed as followed:

United States Attorney
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JAMES H. ROLLINS

Duly sworn to and subscribed
before me this 20 day of
~~May~~^{July}, 1977.



My Commission expires 5/12/86

